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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 536

**SIDNEY S. LEVINE AS EXECUTOR UNDER THE LAST
WILL AND TESTAMENT OF ANNA M. KANE, DE-
CEASED, PETITIONER**

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 27-39)¹ is reported at 80 F. Supp. 674.

JURISDICTION

The judgment of the Court of Claims was entered on November 1, 1948 (Pet. 27, 39). The petition for a writ of certiorari was filed on January 29, 1949. While the petition does not dis-

¹ All references herein are to the petition for a writ of certiorari inasmuch as the record was not separately printed but was incorporated into the petition.

close the basis for the jurisdiction of this Court, it is assumed that such jurisdiction is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED²

Whether the Court of Claims erred in declining to assume jurisdiction of a claim for war risk life insurance benefits where the statute authorizing the issuance of the insurance confines jurisdiction over such claims to the District Courts.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations are set out in Appendix A, *infra*, pp. 12-17.

STATEMENT

This case arises out of a claim for the benefits of war risk insurance issued by the Government on the life of a civilian employee of the War Department's Army Transport Service. The following statement summarizes the facts as alleged in the petition filed in the court below (Pet. 10-18) :

From May 1944 to the date of his death, June 24, 1945, Patrick J. Kane, Jr. was a civilian em-

² The petition not only fails to state or specifically bring forward any question for consideration by this Court, but also fails to set forth the reasons relied on for the allowance of the writ of certiorari. This lack of compliance with the requirements of Rules 41 and 38 of the Rules of this Court would, in accord with the cases cited in Rule 38, par. 2, appear to be sufficient reason for denying the petition. See also, *Tiger v. Lozier*, 275 U. S. 496.

ployee of the War Department (Pet. 10-11). At the time of his death, which resulted from injuries sustained on June 19, 1945, while "under orders of the War Department,"³ he held the position of Chief Engineer in the Army Transport Service of the War Department. His mother, who had been designated as beneficiary of any war risk benefits payable for loss of his life, died on January 10, 1946 (Pet. 10, 11, 12, 15-16).

On July 17, 1947, more than two years after Patrick J. Kane died, petitioner, as executor under the mother's will, instituted suit in the Court of Claims, claiming \$5,000 in war risk benefits and insurance (Pet. 10-14, 22). The petition in that court alleged that "pursuant to Public Law No. 267 of the Sixty-fourth Congress [i. e., the United States Employees' Compensation Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. 751] and other governmental regulation the defendant agreed to insure the said Patrick J. Kane, Jr., for the sum of Five Thousand (\$5,000) Dollars if his death was sustained as the result of

³ The nature of these orders is not set forth in the record but is revealed by a letter of August 4, 1947, from the Bureau of Employees' Compensation to the Department of Justice. That letter shows that on June 19, 1945, the deceased employee, while en route by rail from California to New York, became intoxicated in the Pullman car in which he was traveling and was soon thereafter found unconscious along the railroad right of way near Grand Junction, Iowa. A copy of the Bureau's letter is reprinted in Appendix B, *infra*, pp. 18-19.

the risk of war or war-like operations, and further agreed to insure his life for benefits of the United States Employees Compensation Act if death was sustained while in the performance of duty, as more fully provided for by subd. C. of the Marine Personnel Regulations * ;" that Kane accepted the "war risk benefits and insurance tendered to him by the Statutes of the United States Government and the Rules and Regulations of the Marine Personnel Regulations * * * and * * * the same became a binding contract * * * ;" that his death resulted from injuries received "while on duty under orders from the defendants and while engaged in a warlike operation;" and that due proof of death was furnished but that defendants have failed to "pay the whole or any part of said insurance or death benefit." (Pet. 11-13.) On February 4, 1948, the United States withdrew a general traverse it had formerly filed and entered a plea to the jurisdiction on the ground that the jurisdiction of the Court of Claims does not extend to claims founded on the United States Employees' Compensation Act, or the Act of April 11, 1942 (56 Stat. 214), amending the Merchant Marine Act, 1936 (Pet. 3, 18). In opposing this plea petitioner argued that "there is in this particular case a dual or alternative right of insurance, one under the statute and the other under simple contract," and that his

* The pertinent Marine Personnel Regulations are reprinted in Appendix A, *infra*, pp. 15-17.

claim is "based upon a simple contract of insurance," independent of any statute (Pet. 21, 23).

The Court of Claims, in a unanimous decision, ruled that the petition does not "reveal a claim founded upon a simple contract the terms of which must not in some part be found in the statutes and the regulations pursuant to which the several benefits claimed by plaintiff were made available" (Pet. 31). After so ruling, the court concluded that relief in the courts under the Employees' Compensation Act has not been authorized by Congress, pointing out, however, that even if it be assumed that Congress has made administrative action taken under that Act subject to judicial review in proper cases, the allegations of the petition would be clearly insufficient to invoke its jurisdiction, because they fail to show "that any action was taken before the administrative body charged with the execution of the Compensation Act to obtain such benefits as may have been available to plaintiff thereunder," or "that any liability is admitted by the Federal Security Administrator for benefits accruing under that Act" (Pet. 34). The court then held that if the claim be considered as one for insurance benefits under the Merchant Marine Act, 1936, as amended, only the District Courts may entertain jurisdiction thereof. The court accordingly sustained the plea to the jurisdiction and dismissed the petition (Pet. 34-39).

ARGUMENT

The Court of Claims properly rejected petitioner's contention that it had jurisdiction over the instant claim for war risk life insurance benefits.⁵ That contention is unsound because (1) jurisdiction of such claims is expressly confined to the District Courts, and (2) there is here involved no independent contract which would enable the Court of Claims to entertain the claim under its general contract jurisdiction. In addition, petitioner suggests no special or important reason for invoking the discretionary jurisdiction of this Court. We accordingly submit that review here by writ of certiorari is unwarranted.

1. Petitioner concedes that "there may be some weight" to the proposition that claims for war risk benefits under the Merchant Marine Act, 1936, as amended, are not cognizable in the Court of Claims (Pet. 23). That no doubt exists on

⁵ The petition filed in the court below refers to benefits under the Employees' Compensation Act as well as to war risk life insurance benefits (Pet. 11). However, this Court has held that the Employees' Compensation Act does not contemplate or provide for suits against the Government. *Dahn v. Davis*, 258 U. S. 421, 431. Furthermore, petitioner's brief in opposition to the Government's plea to the jurisdiction of the Court of Claims clearly shows that the claim is limited to the insurance benefits (Pet. 22-26), and, as the court below noted, the allegations of the petition filed in that court fail to show that application for relief under the Compensation Act was ever made to the administrative officers charged with the execution of that Act (Pet. 34).

that score is apparent from the express terms of that statute which vest jurisdiction in such cases in the District Courts. Section 225 of the Act states that "in the event of disagreement as to a claim for losses or the amount thereof, on account of insurance * * * an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside * * *. Said suits shall proceed and shall be heard and determined according to the provisions of an Act * * * (known as the Suits in Admiralty Act) * * *." See Appendix, A, *infra*, pp. 13-14.

Even in the absence of the statutory requirement that the suits be heard in accordance with the provisions of the Suits in Admiralty Act, there would seem to be no doubt of the exclusive jurisdiction of the District Courts over the war risk insurance claims. In *United States v. Pfitsch*, 256 U. S. 547, this Court, in referring to statutory language almost identical to the authorization contained in Section 225 to sue in the District Courts, stated at p. 552:

it is significant that this is not the only occasion upon which Congress has provided for suits against the United States *exclusively in the District Courts*. Section 1 of the War Risk Insurance Act of May

20, 1918, c. 77, 40 Stat. 555, provides that suits upon [veterans'] insurance policies "may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any of them resides." * * * And Section 2 of the Act of July 11, 1918, c. 145, 40 Stat. 898, permits suits against the United States on marine insurance "in the district court of the United States, sitting in admiralty." [Italics supplied.]

Accord: *United States v. McGovern*, 299 Fed. 302, 303 (C. A. 9); *Mara v. United States*, 54 F. 2d 397, 399 (S. D. N. Y.); *McBean v. United States*, 80 C. Cls. 227.

Where, as here, the statute authorizing insurance claimants to sue the United States requires the bringing of such suits in accordance with the provisions of the Suits in Admiralty Act, there can be no question that the only proper forum is the District Court. Section 2, Suits in Admiralty Act, Appendix A, *infra*, p. 15. The exclusiveness of the District Court's jurisdiction under the latter Act is settled. *Matson Navigation Co. v. United States*, 284 U. S. 352, 356; *Johnson v. Fleet Corporation*, 280 U. S. 320; *United States Shipping Board Emergency Fleet Corp. v. Rosenberg Bros.*, 276 U. S. 202. And, the incorporation into Section 225 of the provisions of the Suits in Admiralty Act specifically confines the determination of insurance claims

under that Section within the exclusive jurisdiction of the District Court, precluding resort to any concurrent remedy in the Court of Claims. *United States v. Leahy*, 148 F. 2d 462, 466 (C. A. 3). The instant action, so far as we have been able to ascertain, represents the first endeavor to depart from the statutory requirement that war risk life insurance claims be prosecuted in the District Courts. Cf. *Crist, Administratrix v. United States War Shipping Administration*, 163 F. 2d 145 (C. A. 3); certiorari denied, 332 U. S. 852; *Reinold v. United States*, 167 F. 2d 556 (C. A. 2), certiorari denied, 335 U. S. 824; *Sorenson v. United States*, 69 F. Supp. 660 (S. D. N. Y.); *Quinn v. United States*, 72 F. Supp. 94 (D. Hawaii); *Sutton v. United States*, 73 F. Supp. 996 (N. D. Cal.); *Daranowich v. United States*, 73 F. Supp. 1004 (S. D. N. Y.); *Ferro v. United States Lines Co.*, 74 F. Supp. 250 (S. D. N. Y.)⁶

2. Petitioner, seeking to avoid the jurisdictional requirement of the Merchant Marine Act, 1936, argues that his claim is one founded on a common law contract of insurance independent

⁶ Petitioner recognizes (Pet. 21) that his suit is barred by the two-year limitation provision in the Suits in Admiralty Act (Section 5, 47 Stat. 420, 46 U. S. C. 745), which is carried over into Section 225 of the Merchant Marine Act. See *Sorenson v. United States*, 69 F. Supp. 660 (S. D. N. Y.). As indicated above, p. 2, Patrick J. Kane died on June 19, 1945, and suit was not filed until July 17, 1947.

of any statute and therefore cognizable in the Court of Claims under 28 U. S. C. 1491 (4).⁷ This alleged contract is claimed to stem from the War Department's agreement in its Shipping Articles with the deceased employee to provide benefits for injury or death of crew members (Pet. 4).

That agreement, however, was nothing more than a statement by the War Department of its willingness to procure the necessary insurance protection for crew members from the Maritime Commission⁸ under the Merchant Marine Act, 1936. As stated by the court below, "the War Department itself was not engaged in the insurance business * * * [and] * * * it is not alleged that the War Department itself insured Kane" (Pet. 32). Section 224 (b) of the Act, in fact, specifically authorizes the Commission to provide war risk life insurance at the request of the War Department. See Appendix A, *infra*, p. 13. The procurement of the war risk life insurance policy by the War Department from the proper governmental agency constituted, we submit, complete fulfillment by the Department of its obligation under the Shipping Articles. See *Murphy v. Gulf Oil Corporation*, 55 F. Supp.

⁷ Formerly 28 U. S. C. 250 (1), Section 145 of the Judicial Code.

⁸ By Executive Order 9054, 7 F. R. 837, the power of the Maritime Commission to write war risk insurance policies was temporarily vested in the War Shipping Administration.

962, 963 (E. D. Pa.). Petitioner's complaint is not that the War Department failed to procure such insurance (Pet. 32), but rather that he is entitled to recover its proceeds from the United States. This is the precise type of claim contemplated by Section 225 of the Merchant Marine Act, 1936 (Appendix A, *infra*, pp. 13-14) and is, therefore, cognizable only in the District Courts. Any other conclusion would, as pointed out by the Court of Claims, allow litigants to seize upon that court's general jurisdiction to hear contract claims as a device for avoiding the specific jurisdictional requirements of statutes under which the benefits are sought (Pet. 33).

CONCLUSION

The decision of the court below is clearly correct. It is not in conflict with any decision of this Court, and further review is not warranted. The petition for a writ of certiorari, which does not conform to the Rules of this Court,⁹ should be denied.

Respectfully submitted.

	<p>PHILIP B. PERLMAN, <i>Solicitor General.</i></p> <p>H. G. MORISON, <i>Assistant Attorney General.</i></p> <p>PAUL A. SWEENEY, MORTON HOLLANDER, <i>Attorneys.</i></p>
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MARCH 1949.

⁹ See fn. 2, *supra*, p. 2.

APPENDIX A

1. The pertinent provisions of the Merchant Marine Act, 1936, as amended (c. 240, 56 Stat. 214, c. 26, 57 Stat. 45, 46 U. S. C. 1128a, 1128c and 1128d) provide as follows:

SEC. 222. The Commission may insure against loss or damage by the risks of war, persons, property, or interests, as follows:

* * * * *

(e) Masters, officers, and crews of such vessels and other persons employed or transported thereon against loss of life, personal injury, or detention by an enemy of the United States following capture.

(f) Statutory or contractual obligations or other liabilities of such vessels or of the owner or charterer of such vessels of the nature customarily covered by insurance; and, whenever the Commission shall insure any risks included under subsection (d) or (e) of this section, or under this subsection insofar as it concerns liabilities relating to the master, officers, and crews of such vessels or to other persons transported thereon, the insurance on such risks may include marine risks to the extent that the Commission determines to be necessary or advisable.

SEC. 224. (a) Any department or agency of the United States is hereby authorized to procure insurance from the Commission as provided for in sections 222 and 229 of this subtitle or in section 10 of the Merchant Marine Act, 1920, as amended, except as provided in the Government Losses in

Shipment Act, approved July 8, 1937, as amended (50 Stat. 479; U. S. C., Supp. VI, title 5, secs. 134 to 134h).

(b) The Commission is authorized to provide such insurance at the request of the Secretary of War or the Secretary of the Navy on a nominal premium basis in consideration of the agreement of the department concerned to indemnify the Commission against all losses covered by such insurance, and the Secretary of War or the Secretary of the Navy is authorized to execute such indemnity agreement with the Commission.

SEC. 225. In the event of disagreement as to a claim for losses or the amount thereof, on account of insurance under this subtitle, an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which the claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service. Said suits shall proceed and shall be heard and determined according to the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes", approved March 9, 1920, as amended (known as the Suits in Admiralty Act), insofar as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of this subtitle. All persons having or claiming to have an interest in such insur-

ance, or who it is believed might assert such an interest, may be made parties to such suit, either initially or upon the motion of either party. In any case where the Commission acknowledges the indebtedness of the United States on account of such insurance, and there may be a dispute as to the person or persons entitled to receive payment, the United States may bring an action in the nature of a bill of interpleader against the persons having or claiming to have any interest in such insurance, or who it is believed might assert such an interest, in the District Court of the United States for the District of Columbia, or in the district court in and for the district in which any such person resides. In either of such actions any person claiming to have an interest in such insurance, or who it is believed might assert such an interest, if not an inhabitant of or found within the district within which either of such actions is brought, may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct, and if it be shown to the satisfaction of the court that persons unknown might assert a claim on account of such insurance, the court may direct service upon such persons unknown by publication in the Federal Register. Judgment in any such action shall discharge the United States from further liability to any parties to such action, and to all persons where service by publication upon persons unknown is directed by the court. The procedure herein provided shall apply to all actions now pending against the United States under the provisions of this subtitle, as amended.

2. Section 2 of the Suits in Admiralty Act (c. 2, 41 Stat. 525, 46 U. S. C. 742) provides in pertinent part, as follows:

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

3. Section 1, Regulation No. 12 of Marine Personnel Regulations, Transportation Corps, Army Service Forces (Pamphlet No. 4, July 1, 1944) provides as follows:

SECTION 1

GENERAL PROVISIONS

	Paragraph
Legal Basis	1
Explanation of Legal Basis	2

Legal Basis

121.1 a. The Act of 11 April 1942 (Public Law 523—77th Congress) authorizes the Secretary of War to procure from the War Shipping Administration insurance covering the loss of life and disability

sustained as a result of the risks of war, by civilian crew members of vessels operated by the War Department.

b. The Employees' Compensation Act of 7 September 1916 (Public Law 267—64th Congress) provides that the United States shall pay compensation for disability or death of an employee resulting from a personal injury sustained while in the performance of duty.

Explanation of Legal Basis

121.2 If disability or death is sustained by a crew member, not as a result of the risks of war or of warlike operations nor as a result of certain marine risks, the insurance procured from the War Shipping Administration shall not be payable, but the employee concerned shall be eligible for the benefits of the United States Employees' Compensation Act if the disability or death was sustained while in the performance of duty. On the other hand, if disability or death is sustained by a crew member as a result of the risks of war or warlike operations, the employee concerned or his beneficiary has an option as between war risk insurance benefits and compensation benefits. The U. S. Employees' Compensation Commission is by statute authorized to make final decisions, there being no appeal to a higher authority. The Compensation Commission has declared that it would, as a matter of policy, rule that any benefits paid under the Policy of Insurance would be offset against compensation benefits; i. e., if a beneficiary or beneficiaries elect to accept a lump sum payment of \$5,000.00 under the Policy of Insurance, no compensation benefits will

be paid until such time as the total monthly payments prescribed in the Compensation Act would total the amount of insurance benefits paid. After the expiration of such period, should the legal beneficiary or beneficiaries named in the Compensation Act still be eligible for compensation benefits, such benefits will be extended to execute in full the statutory obligation of the United States Government by reason of Public Law 267—64th Congress.

APPENDIX B

LETTER FROM BUREAU OF EMPLOYEES' COMPENSATION

AUGUST 4, 1947.

Honorable PEYTON FORD,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

DEAR MR. FORD: The Bureau received your request dated July 24, 1947, transmitting, as required by section 188 of the Revised Statutes, printed copy of the petition of Sidney S. Levine as executor, etc., against United States Government, et al., No. 45574, in the Court of Claims.

The Bureau's records show that one Patrick J. Kane, deceased, who was the son of Anna M. Kane, petitioner's testatrix, was employed as a chief engineer by the Army Transport Service and while en route by rail from California to the Port of New York sustained fatal injuries on June 19, 1945, from which he died on June 24, 1945. Investigation by the Bureau in connection with the claim for compensation under the Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. sec. 751, et seq., filed by Anna M. Kane (and an alleged common law widow), showed that the deceased was intoxicated in the Pullman car on which he was traveling, and when last seen was asleep in the smoking compartment. He was not seen again until he was found unconscious

along the railroad right-of-way about two and one-half miles west of Grand Junction, Iowa. There was no direct evidence to show how, or why, the deceased left the car. The Bureau rejected the claim for compensation upon the ground that the injury was not sustained in the performance of duty. The Bureau, of course, had no claim filed with it relating to the claim filed by petitioner in the Court of Claims based upon the insurance agreement issued by the War Department covering the death of Patrick J. Kane from war risk hazards.

The Bureau's file contains numerous statements, reports, affidavits, certificates, interviews, and other documents obtained in connection with the investigation of the claim for compensation. If any information in the Bureau's file will be of assistance in the defense to the petition the Bureau will be pleased to furnish same upon request, or will make the file available for your inspection to ascertain whether you desire to have photostats of any parts thereof.

Very truly yours,

(S) H. P. MILLER,

Acting Chief Counsel.